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IN THE

Supreme Court of the United States

October Term, 1969. No. 952

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

JON E. YOUNT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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Assistant District Attorney,
Chief, Appeals Division,
ARLEN SPECTER,
District Attorney,
Philadelphia, Pennsylvania,
JOHN K. REILLY, JR.,
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Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

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The opinion of the Court of Quarter Sessions of Philadelphia County dening Respondent's motions in arrest of judgment and for new trial is unreported and is printed at pages 29 to 36 of the Appendix hereto. The opinion of the Supreme Court of Pennsylvania reversing the judgment of sentence entered by the Court of Quarter Sessions of Clearfield County is reported at 435 Pa. 276 (1969), and is printed at pages 37 to 43 of the Appendix hereto.

JURISDICTION.

The original order of the Pennsylvania Supreme Court was entered on June 27, 1969. Reargument was denied on August 25, 1969. On November 25, 1969, Mr. Justice Brennan extended the time for filing this petition to December 8, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED.

The second sentence of Section I of the 14th Amendment to the United States Constitution provides in pertinent part as follows:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

The 5th Amendment to the United States Constitution in pertinent part as follows:

> no person . . . shall be compelled in any criminal case to be a witness against himself.

The 6th Amendment to the United States Constitution in pertinent part as follows:

> in all prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

QUESTIONS PRESENTED.

I. When this Court in Footnote 43 of the *Miranda* opinion advised police to warn defendants of their right to free counsel in all but the clearest cases of non-indigency, in order to avoid unnecessary ex post facto inquiries into defendants' financial ability, was not this Court urging police and prosecutors to give the additional warning in order to minimize unnecessary litigation rather than seeking to exclude the confessions of non-indigent defendants, and did not the Supreme Court of Pennsylvania err in holding that the confession of a *non-indigent* defendant must be suppressed absent the fourth *Miranda* warning contrary to the large number of federal and state decisions holding it inapplicable under these circumstances?

II. When respondent's confession was given before the *Miranda* decision and that decision intervened before trial, should the confession be held inadmissible merely because the police failed to anticipate the *Miranda* requirement that a suspect be warned of his right to free counsel where the evidence is clear that respondent could not have availed himself of free counsel because he was not indigent and where the evidence is overwhelming that respondent's confession was voluntarily made after respondent had knowingly waived all his constitutional rights in that he had appeared, unsolicited and unsuspected at the police station and had made himself a suspect only by the initial statements of his confession which he wrote in longhand after being warned of all of his other rights immediately upon

becoming a suspect or, to the degree that *Johnson v. New Jersey* requires the exclusion of such a confession, should not *Johnson* be modified to conform with this Court's more recent rulings on retroactivity and permit the Commonwealth to prove the voluntariness of respondent's confession under appropriate standards?

STATEMENT OF THE CASE.

This Petition arises out of the conviction of the Respondent in the Court of Quarter Sessions of Clearfield County, Pennsylvania of murder in the first degree and rape. Punishment was fixed at life imprisonment. The judgment of sentence was reversed and respondent's motion for new trial was granted by the Pennsylvania Supreme Court; Chief Justice Bell dissenting, *Commonwealth v. Yount*, 435 Pa. 276 (1969). Review is now sought in this Court.

The facts relevant to this petition are: Early in the morning of April 29, 1966, at approximately 5:00 a.m., respondent appeared, unsought and uninvited, at the Pennsylvania State Police substation in DuBois, Pennsylvania, and, upon entering, told the police that "I am the man you are looking for." When the policeman asked respondent whether he was referring "to the incident in Luthersburg," respondent replied affirmatively (Hearing N. T. 5). Thereafter, the police checked the respondent's identification and asked him to sit down and gave him food.

Another policeman then began questioning him, and respondent stated that "I killed that girl." Asked "What girl?", he answered "Pamela Rimer," who was the decedent. Respondent was then asked how he killed the girl. He answered that he struck her with a wrench and choked her. At this point, recognizing that respondent might, in fact, be actually involved in the killing, the officer advised respondent that this was a serious matter and that he had a right to counsel. Respondent answered that "This is a

police matter and I came here to tell you because I couldn't sleep" (N. T. Hearing at 8). Respondent also stated that "If my family thinks I should have an attorney they can get me an attorney." Thereafter, the policeman repeatedly advised respondent that:

> It was a very serious matter, that he did not have to tell us anything, and that he had a right to an attorney. I also asked him if he wanted us to call him an attorney.

Respondent's reply to this question was, "Don't bother." Respondent was also told by the police that anything he said would be used against him in Court (Hearing N. T. at 9). The police testified that respondent appeared to be "Calm and collected" during this period of time (Hearing N. T. 10). Respondent then wrote out in his own handwriting a statement detailing where and how he murdered Pamela Rimer (Trial N. T. at 339-41).

A second statement was given to the District Attorney of Clearfield County, Pennsylvania later on the morning of April 29, 1966. This statement repeated the facts of respondent's first statement (Trial N. T. 360-367). Prior to questioning respondent the District Attorney asked the following questions:

> District Attorney: Jon has anyone explained to you your rights to an attorney?
>
> Respondent: They said I had a right to an attorney. I haven't decided on it yet.
>
> District Attorney: Now Jon, you realize you don't have to tell me anything if you don't want to; as you can see, Mrs. Campbell is taking your statement down. If you decide to tell me anything it can be used against you.
>
> Respondent: It is there in my report (this is a reference to respondent's first statement) (Trial N. T. 361-2).

Unsatisfied even with these questions the District Attorney returned to the issue after respondent's further statement, asking the following questions:

District Attorney: Did you come here to the State Police substation voluntarily this morning?

Respondent: Yes.

District Attorney: Did you come alone?

Respondent: Yes.

District Attorney: Since you have gotten here have you been treated in a kind manner?

Respondent: The officers have been gentlemen.

District Attorney: Have any promises been made to you?

Respondent: No.

District Attorney: Do you want to contact an attorney to represent you?

Respondent: I am not sure I want an attorney. I would not know who to get for sure. If my mother has an attorney I hope she will let me know. If not, you will have to do it.

District Attorney: Did you make this statement voluntarily on your own behalf?

Respondent: Certainly.

District Attorney: Realizing that you have the right to remain silent if you want?

Respondent: Yes.

District Attorney: And that you have the right to counsel?

Respondent: Yes.

(Trial N. T. 367).

At the suppression hearing, respondent testified in response to questioning as follows (Hearing N. T. 31):

Q. Did the police officers advise you that under the laws, an attorney would be appointed to represent you in the matter, if you so desired?

A. I don't recall any police officer saying that. I think Mr. Reilly told me that though, that the Court would appoint one if I wanted one.

In addition, at pages 40 and 41 of the same transcript, respondent testified in response to questions as follows:

Q. But you knew you could have an attorney if you wanted it. Is that correct?

A. No at the present time I didn't know that. I didn't know I could get one right at the moment on the spot. I knew eventually I could have an attorney. You told me I could have a Court-appointed attorney if I so desired; but with my understanding of the law, I didn't know that right then, at the moment, I could have one.

However, prior to that respondent had told Detective Kerr, as evidenced on page 318 of the notes of testimony at the trial, "he then told me that he couldn't sleep, that this was a police matter, that he had to tell us; that if he wanted an attorney, he would have went (sic) to an attorney." Further, the defendant stated, as evidenced on page 9 of the transcript of testimony of the hearing of September 19, 1966, in response to a question as follows:

A. I also asked him if he wanted us to call him an attorney.

Q. What was his reply?

A. Don't bother.

Throughout the testimony of both respondent and the police officers, it is repeatedly stated that the reason respondent went to the police station was that he couldn't sleep, that he wanted to tell the police of his involvement in the death of Pamela Sue Rimer and that this was a police matter and had he wanted an attorney, he would have gone to an attorney.

At the time of his arrest, respondent was employed as a teacher in the DuBois High School (Trial N. T. 361). Respondent's wife worked in a nearby factory (Trial N. T. 494-5). Respondent's father was also employed (Trial N. T. 520). At the time of trial respondent had a bachelor's and master's degree from Pennsylvania State University. Eugene A. Cease, a clinical psychologist, testified that respondent had a verbal I.Q. of 123, a performance I.Q. of

118, and a full scale I.Q. of 122. "This would classify him in the superior range of intelligence" (N. T. Trial 898).

Respondent in his confessions recounted the murder of Pamela Rimer as follows: On the afternoon of April 28, 1966, respondent drove his car out to the countryside to look for some property to purchase. Respondent drove along one road when he recognized one of his students, Pamela Rimer, walking along the road. Respondent stopped his car, and asked Pamela whether she knew of any land for sale. She said that she did and pointed to where the land was. Respondent then offered to give her a ride home which she accepted. At this point respondent admits that he must have said something untoward which upset Pamela. Respondent panicked, picked up a wrench and hit Pamela several times. The next thing respondent remembered was running in a field after Pamela, catching her, taking hold of her throat, and then everything going black. Respondent left the scene of the murder, disposed of the wrench, went home and changed his blood stained clothes and burned some of them (Trial N. T. 363-65).

On April 28, 1966, the body of Pamela Rimer was found in a wooded area near her home. The autopsy revealed that the cause of death was due to shock, loss of blood and a strangulation effect or suffocation due to an excess of blood in the lungs. Examination revealed numerous wounds about the girl's head caused by a blunt weapon, cuts of her throat and cuts of her fingers of her left hand, apparently caused by a sharp instrument, and bruises on the frontal aspect of her thighs. When found, the girl's body was not fully clothed in that one stocking and one shoe had been removed and the stocking tied around her neck. The shoe was found partly hidden by the body. The rest of her clothing, while still on her body, was in a state of disarray. The autopsy revealed that semen was present in the vagina of the victim.

REASONS FOR ALLOWING WRIT.

I. WHEN THIS COURT IN FOOTNOTE 43 OF THE MIRANDA OPINION ADVISED POLICE TO WARN DEFENDANTS OF THEIR RIGHT TO FREE COUNSEL IN ALL BUT THE CLEAREST CASES OF NON-INDIGENCY IN ORDER TO AVOID UNNECESSARY EX POST FACTO INQUIRIES INTO DEFENDANTS' FINANCIAL ABILITY, IT WAS NOT SEEKING TO EXCLUDE THE CONFESSIONS OF NON-INDIGENT DEFENDANTS BUT WAS URGING POLICE/AND PROSECUTORS TO GIVE THE ADDITIONAL WARNING IN ORDER TO MINIMIZE UNNECESSARY LITIGATION: ACCORDINGLY, THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE SUPREME COURT OF PENNSYLVANIA WHICH HELD THAT THE CONFESSION OF A NON-INDIGENT DEFENDANT MUST BE SUPPRESSED ABSENT THE FOURTH MIRANDA WARNING AND THE LARGE NUMBER OF FEDERAL AND STATE DECISIONS HOLDING IT INAPPLICABLE UNDER THESE CIRCUMSTANCES.

In deciding this case under *Miranda v. Arizona*, 384 U. S. 436 (1966), the Supreme Court of Pennsylvania reluctantly faced the argument that the police had no duty to warn respondent of his right to free counsel because respondent could afford counsel. The specific language of the court fails to come to grips with the real question presented: Was respondent entitled to the warning that he might have free counsel even though, in fact, he could not have had free counsel appointed to advise him of his statement? Instead, the Supreme Court of Pennsylvania framed the question in terms of the knowledge of the police concerning respondent's ability to afford counsel. Moreover, the Pennsylvania Court spoke not in terms of respondent's ability to

afford counsel to represent him at the interrogation, but his ability to afford counsel to represent him throughout the long and elaborate murder prosecution which might follow. Curiously enough, by adopting this theory, the Pennsylvania Supreme Court effectively deprived the Commonwealth of the benefit of the inferences and facts which establish clearly that respondent had absolutely no right to appointed counsel. This is so because the clearest proof of respondent's non-indigency is in the fact that he was represented by privately-retained counsel at the time of the preliminary hearing, hearing on the motion to suppress, trial, and appeal. But, by making the whole matter turn on the knowledge of the police rather than the facts, this conclusive evidence was rendered immaterial. Similarly, although the court below alluded to respondent's occupation as a school teacher, it avoided all mention of the fact that respondent's wife was employed and that respondent had two cars and was looking for more real property to buy at the very time the crime was committed. The court, likewise, foreclosed consideration of any of the other facts which might well have further established respondent's ability to retain private counsel, the ability which would have disqualified respondent from receiving free counsel had he been warned of that right. The language of the Pennsylvania Supreme Court on this point is clear (435 Pa. at 280-81):

> At oral argument the Commonwealth also maintained that the police were not obligated to tell appellant that he had a right to free counsel if necessary because they knew that he could afford counsel. The Court in *Miranda* stated the rule relied on by the Commonwealth as follows: "While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, *the expedient of giving a warning is too simple and the rights involved too important to engage in ex post facto in-*

quiries into financial ability when there is any doubt at all on that score." 384 U. S. at 473, n. 43, 86 S. Ct. at 1627, n. 43. (Emphasis added.) We recently held in *Commonwealth v. Dixon and Kontos,* supra, that "this loophole is a narrow one which can be utilized only in the clearest of cases." 432 Pa. at 426-27, 248 A. 2d at 233.

This case is exactly the kind in which we should not indulge in "ex post facto inquiries into financial ability." Appellant was a school teacher, and it could hardly be assumed that his past earnings easily could bear the weight of expense that a murder trial would entail. As we pointed out in *Dixon and Kontos,* the requirement of warnings is designed to prevent us from having to speculate about a situation where appellant may have been "unaware that free counsel was available if necessary, had been reluctant to incur further [Kontos had been represented by counsel in another matter] attorney fees, and had decided to try to get through the questioning unaided." *Id.* at 427, 248 A. 2d at 234. In the case before us, we can hardly say that the police could properly entertain that degree of certainty concerning appellant's ability to retain counsel so as to obviate the need for telling him that free counsel was available if necessary. We thus hold that appellant's confessions were erroneously admitted.

In so deciding, the Pennsylvania Supreme Court has misread the holding of this Court in *Miranda* and has taken a position directly opposed to repeated, well-considered decisions of both the United States Court of Appeals for the Second Circuit and the highest appellate courts of every state other than Pennsylvania which has considered this question.

This Court's intention in Footnote 43, while it spoke in terms of a "person who is known to have an attorney or is

known to have ample funds to secure one," was clearly to avoid unnecessary litigation when it is so easy for the police to give the full *Miranda* warnings. Where, however, the very record created by the ordinary litigation in the case establishes that the respondent would not have been entitled to free counsel for the interrogation, nothing in this Court's decision in *Miranda* requires the federal or state courts to disregard the clear evidence in the record.

Among the many decisions which have considered this question, there is no great unanimity as to the test to be used in determining whether the absence of the fourth *Miranda* warning is reversible error, but there is no question that in no jurisdiction which has considered the question except Pennsylvania would the confession here found inadmissible have been grounds for a finding of reversible error.

In *State v. Gray*, 268 N. C. 69, 150 S. E. 2d 1 (1966), the defendant was convicted in the Superior Court, Martin County, of feloniously breaking and entering and of larceny by breaking and entering and he appealed. The Supreme Court of North Carolina on September 21, 1966, held that where it was not contended that defendant was an indigent at the time of his interrogation by the police, his constitutional right against self-incrimination was not violated because officers failed to advise him of the rights of indigents to be represented by an attorney. Certiorari was denied by this Court in this case in 386 U. S. 911 (1967). In *Gray*, the defendant was advised of his right to remain silent or make a statement; that anything he said would be used against him; and that he had a right to confer with counsel.

The court in *Gray* at 150 S. E. 2d 11 said:

> We hold that the admission of this Defendant's alleged statements to the officers does not violate his right under the due process clause of the 14th Amendment, as interpreted by the United States Supreme Court in the *Miranda* case, because there is nothing in

> the record to show, and it has not been contended by the defendant, either in the trial court or before us, that this defendant was an indigent entitled to have counsel appointed for him at the time of his arrest and conversations with the officers. It cannot violate this Defendant's constitutional right against self-incrimination for the officers in their interrogation to fail to advise him of rights which some other person might have but which he does not have in view of his own circumstances.

In a similar fact situation, the Supreme Court of Georgia in the case of *Griffith v. State*, 223 Ga. 543, 156 S. E. 2d 903 (1967), cited *Gray* at p. 904 and went on to say:

> In the decision of the Supreme Court of the United States concerning in-custody interrogation (*Miranda v. State of Arizona*, 384 U. S. 436, 473 (fn. 43), 186 Supreme Court 1602, 1627, 16 L. Ed. 2d 694) it is stated that:
>
> > "A warning that the indigent may have counsel appointed need not be given to the person who is known to have ample funds to secure one . . ."
>
> Under this decision only an indigent must be informed of the right to appointed counsel. Therefore, an objection to the admission of a confession only upon the ground that the defendant was not informed of this right is insufficient, because not all persons are entitled to be so advised. The objection entered here merely maintains that the defendant has not been accorded a right without any contention or claim that he comes within the class entitled thereto.

In *United States v. Fisher*, 387 F. 2d 165 (1967), the United States Court of Appeals for the Second Circuit in its opinion handed down December 15, 1967, where a defendant was convicted in the United States District Court for the Southern District of New York for having received things of value from an employer while he was a union

official, stated the law with respect to the fourth *Miranda* warning as follows:

> Appellant was told that he and Camarto were under investigation, "that he did not have to make any statement, any statement he did make could be used against him in a Court of Law; prior to making a statement he had the right to consult an attorney of his choice". This warning complies with that approved in *Miranda v. Arizona* . . . in every particular except that Fisher was not told that counsel could be appointed for him if he lacked funds to retain an attorney. But it would appear that no clear objection was made at trial to this particular omission from the warning, and inasmuch as Fisher was evidently intelligent and aware of his rights, and inasmuch as the Government claims he had always retained an attorney in this matter and was earning approximately $450.00 a week, the omission of this warning, a warning that had no direct applicability to him, see *Miranda v. State of Arizona*, supra at 473, n. 43, it is not so substantial an error that we should consider it . . .

387 F. 2d at 169. This Court also refused certiorari in the *Fisher* case. 390 U. S. 953 (1968).

The same conclusion has been repeated in one form or another in numerous other decisions. See, *e.g., United States v. Messina*, 388 F. 2d 393 (2d Cir.), *cert denied*, 390 U. S. 1026 (1968); *United States v. Luvitsch*, 266 F. Supp. 294 (S. D. N. Y. 1967); *People v. Post*, —— N. Y. ——, 242 N. E. 2d 830 (1968); *State v. Devoe*, 430 S. W. 2d 164 (Mo. 1968); *Dickey v. State*, 444 P. 2d 373 (Wyo. 1968); *Jackson v. State*, —— Tenn. ——, 4 Cr. L. 2370 (1968); *People v. Gosman*, 60 Cal. Rptr. 921 (1967).

The final compelling reason why the absence of this fourth warning in this case of a defendant who could not avail himself of the benefits of this warning is contained in the decision of this Court in *Harrington v. California*, 395 U. S. 250 (1969), and *Chapman v. California*, 386 U. S. 18

(1967). Once this Court had resolved in *Chapman* and *Harrington* that constitutional harmless error could exist, it became impossible to hold that the absence of the fourth *Miranda* warning was reversible error where it could be shown beyond a reasonable doubt that a defendant could not have availed himself of free counsel had he been warned of his right to it. This seems doubly true once it is recognized, as it was by this Court in its very opinion in *Miranda*, that the specific rules set forth in *Miranda* are not compelled in particularity by the Constitution. This Court itself held (384 U. S. at 490):

> We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.

The Court also concluded, however, that the safeguard of these warnings was required to guarantee the rights of defendants, many if not most, of whom were indigent. Where, however, the form of the rule was not dictated by the absolute command of the Constitution but by the wisdom of this Court in enforcing the constitutional command, it is certainly even more appropriate to recognize the applicability of the *Harrington-Chapman* doctrine than in a case of direct violations of the constitutional mandate itself.

This being the case, this Court should grant certiorari and resolve the conflict increasingly developing among the courts throughout the United States as to whether the absence of the fourth *Miranda* warning requires the exclusion of a confession despite the absence of any claim that the confessing defendant had a right to free counsel at his interrogation, the presence of substantial evidence that the defendant would not have a right to free counsel at his

interrogation, and indeed, the presence or availability of evidence sufficient to prove beyond a reasonable doubt that the defendant would not have the right to free counsel at his interrogation.

II. WHEN RESPONDENT'S CONFESSION WAS GIVEN BEFORE THE MIRANDA DECISION AND THAT DECISION INTERVENED BEFORE TRIAL, THE CONFESSION SHOULD BE HELD ADMISSIBLE IF THE STATE CAN PROVE BEYOND A REASONABLE DOUBT THAT THE CONFESSION WAS GIVEN VOLUNTARILY, AFTER RESPONDENT HAD KNOWINGLY WAIVED ALL HIS CONSTITUTIONAL RIGHTS, AND TO THE DEGREE THAT JOHNSON v. NEW JERSEY REQUIRES A CONTRARY DECISION, JOHNSON SHOULD BE MODIFIED TO CONFORM WITH THIS COURT'S MORE RECENT RULINGS ON RETROACTIVITY.

All of the argument in the preceding section of this brief turns on the theory that this Court, in deciding *Miranda*, did not intend to foreclose the lower federal courts and the courts of the various states from determining that the absence of the fourth *Miranda* warning was harmless error in cases where the defendant, by his lack of indigency, could not have availed himself of appointed counsel even if he had been warned of its availability. But, it is certainly clear that this same argument applies with even greater force to those cases in which the confession was made before the prophylactic requirements of warnings was set forth by this Court in its *Miranda* opinion.

In this case, respondent arrived at the police station of his own choice and with the sole purpose of giving a statement. When the police discovered what Yount's intentions were, they gave Yount all of the warnings which

could conceivably have been required under the law existing in April of 1966. There is no possible way in which the police could have anticipated the decision of this Court in Miranda so as to have given respondent the fourth Miranda warning that he was entitled to free counsel if he could not afford retained counsel, and since respondent was not, in fact, indigent, no prescience or moral-constitutional intuition would have motivated them to innovate for the benefit of respondent.

Even assuming that Footnote 43 in the *Miranda* opinion should be read to bar absolutely the right of the prosecution to prove that a defendant had no right to free counsel —and the very words of the footnote establish that in clear cases of non-indigency the absence of such warnings will not be controlling—, this construction of the footnote as applied to confessions obtained before *Miranda* is clearly neither necessary nor proper. Presumably, the most this Court intended to do in Footnote 43 was to express with extreme clarity the desire that the fourth *Miranda* warning be given in every case. But there was no way for the police who interrogated respondent to know that they should be giving a warning the authority for which did not even exist at the time of the interrogation.

Similarly, the evidence in this case indicates that the statement of respondent, while finally elaborated in the course of some questioning by the police was not motivated in any sense by the police questioning. It is clear that in *Miranda* itself the fact that a defendant appeared at the police station and chose to give a confession was viewed as extremely important by this Court (384 U. S. at 478):

> There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

While the fact that police questioning may technically have brought the confession within the requirements of the *Miranda* guidelines, this volunteering of the confession gave the police and the prosecutor additional reason to believe that the confession was proper and additional reason to anticipate that its admission would be upheld. In this respect, numerous courts have held that the voluntary appearance of the defendant at the police station—often under circumstances which include at least an invitation by the police—was nevertheless material in excusing somewhat less than absolute technical compliance with the *Miranda* guidelines. See, *e.g., Freije v. United States,* 408 F. 2d 100 (1st Cir. 1969); *State v. Graves,* —— S. D. ——, 163 N. W. 2d 542 (1968); *People v. Sunday,* 76 Cal. Rptr. 668 (1969).

While the police since *Miranda* have been on notice that they should give the *Miranda* warnings at the earliest possible point even in the case of a "volunteered" confession, it is certainly not subject to criticism that the police who heard respondent's statement that he had come to the police station to admit that he was the one the police were looking for should have taken it for granted that respondent wanted to give a confession and that it was their duty as well as their right to take the information which he wished to give them. Thus, when they advised respondent of his right to counsel and an attorney and warned him that his statement would be used against him and respondent continued to evince his initial desire to confess, the police were applying no improper tactics when they questioned him briefly about the crime and then encouraged to write out his confession.

The circumstances of the confession, like the fact that respondent was not indigent and could not have availed himself of free counsel, are yet another indication that no substantial violation of *Miranda* occurred in this case.

It is clear that the *Miranda* opinion had a dual basis: First, the Court sought to exclude confessions obtained

without a knowing and voluntary waiver of all of the constitutional rights of the person making the confession before the confession could be admitted. Second, however, this Court determined that it was impossible to guarantee that the intelligence and voluntariness of the waiver could be correctly determined unless the person making the confession had been warned before he confessed of all of the rights which he was waiving, and, accordingly, this Court set forth a series of warnings which should precede all confessions.

Once the Court had determined that such a multi-purpose decision was required, it was faced with the difficult question of the degree of retroactivity which should be given to the decision. On the one hand, the direct constitutional basis of the decision argued for complete retroactivity; on the other hand, the creation of a specific series of warnings to implement the underlying constitutional basis of the case, threatening as it did the likelihood of wholesale disruption of the criminal process because police and prosecutors had failed to anticipate the specific guidelines which the Court did set down, argued equally strongly for prospective application only.

Faced with this dilemma, the Court developed a theory of partial retroactivity. With respect to those cases which had not yet come to trial at the time *Miranda* was decided, the *Miranda* holding and guidelines were made applicable directly. *Johnson v. New Jersey*, 384 U. S. 719 (1966). On the other hand, with respect to those cases which had come to trial prior to the decision in *Miranda*, the absence of *Miranda* warnings was made one factor among many to be considered by the courts in weighing the voluntariness of confessions. *Davis v. North Carolina*, 384 U. S. 737 (1966).

With respect to those confessions obtained after *Miranda* and those cases tried before *Miranda*, this solution posed no problem. With respect, however, to those cases tried after *Miranda* involving confessions obtained before *Miranda*, the decision to apply *Miranda* in absolute form

has proven disastrous to prosecutors, leading to the reversal of convictions based upon wholly voluntary confessions because the police failed to anticipate with exactitude the *Miranda* guidelines. Thus, for example, with respect to confessions like that in this case, where respondent was not even a suspect until he made himself one by confessing, or confessions given by defendants in the presence of their family, friends, ministers, social workers, or other supportive people the only question which a court could ask was whether the defendant was in custody. Once it was determined that he was, the confession was excluded from a post-*Miranda* trial no matter how voluntary and no matter how strong the good-faith actions of the police were if they had not anticipated *Miranda* with exactitude.

In a great number of cases, this result may well have been completely appropriate. Thus, where a defendant was indigent and his confession obtained after extensive questioning with few or no warnings and under conditions similar to those decried in the *Miranda* opinion, it may not have been improper to hold the confession despite its possible admissibility under *Davis* standards. But the fact that retroactivity was appropriate in some, perhaps many or most, cases still awaiting trial at the time of *Miranda* does not argue that it was appropriate in all such cases.

Accordingly, the decision in *Johnson v. New Jersey* should be modified to create a third category of cases, separate both from those tried before *Miranda* and those where the confession was obtained after *Miranda*.[1] In this intermediate group of cases, it may well be appropriate to *presume* that a confession obtained without absolute compliance with *Miranda* is involuntary. But this presumption should be subject to rebuttal where the state can prove by overwhelming evidence that the confession resulted not from any police tactics aimed at obtaining the confession

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[1] The United States Court of Appeals for the Second Circuit reached a similar conclusion in **United States v. Vanterpool**, 394 F. 2d 697 (2d Cir. 1968).

but from the free choice of the defendant to confess. The burden in such cases would be extremely heavy and the proof needed extremely great. On the other hand where, as here, the evidence—both the testimony of respondent and the police being clear and consistent on this point—that respondent came to the police station with the sole intention of making a statement, that the police warned respondent of all such rights as they could have anticipated, when respondent was interrogated but briefly and wrote out his confession in longhand, when he was a highly educated schoolteacher whose grief and conscience clearly continued to operate as his motivating factor after he told the police of the crime and throughout the brief period in which he made the confession, was overwhelming that the confession was voluntarily, knowingly and intelligently given, the confession should be admissible.

Such a three-level test would satisfy all of the aims of *Miranda* since it would fairly assure that the purpose of *Miranda* was satisfied in all trials which followed *Miranda*.

This analysis draws further strength from the more recent decisions of this Court concerning the retroactivity of constitutional overruling decisions. With respect to *Miranda* itself, this Court in *Jenkins v. Delaware*, 395 U. S. 213 (1969) refused to apply *Miranda* directly to the re-trial after *Miranda* of cases first brought to trial before *Miranda*, although it applied it indirectly through *Davis*. The Court, discussing the difficult decision concerning retroactivity which it had faced in *Johnson*, compared the *Johnson* decision with other approaches it had taken in setting standards of retroactivity. It said (395 U. S. at ——, 89 S. Ct. at 1680-81):

> In *Johnson*, after considering the need to avoid unreasonably disrupting the administration of our criminal laws, we selected the commencement of trial as determinative. We of course could have applied *Miranda* to all judgments not yet final, although they were obtained in good-faith reliance upon constitu-

> tional standards then applicable. See Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731 (1965). As we pointed out, however, that choice "would [have] impos[ed] an unjustifiable burden on the administration of justice." 384 U. S., at 733, 86 S. Ct., at 1781. On the other hand, we could have adopted the approach we took in *Stovall* and *Desist* and made the point of initial reliance, the moment the defendant is interrogated, the operative event. See W. Schaefer, *supra*, at 646. But in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted, we selected the commencement of the trial. Implicit in this choice was the assumption that, with few exceptions, the commission and investigation of a crime would be sufficiently proximate to the commencement of the defendant's trial that no undue burden would be imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by *Miranda*.

Implicit in this language is the realization that even the partial retroactivity given to *Miranda* by *Johnson* posed serious problems for prosecutors and should be limited to those cases where the confession and investigation were fresh at the time of *Miranda*.

It seems equally clear that where, as here, the Commonwealth was relying on a confession which complied with *Miranda* in every substantial sense and where the only non-compliance lay in the absence of a warning, meaningless on the facts of the case, that respondent was entitled to free counsel could he not afford his own counsel, that the Commonwealth had a right to rely upon the confession, and the reversal of the case three years after *Miranda* by the Pennsylvania Supreme Court on the basis of an interpretation of *Miranda* not required by the *Miranda* decision places the Commonwealth in a position similar to that

faced by the state in *Jenkins*. This is not to say that *Miranda* does not apply to this case; it is merely to urge that the Commonwealth has a right to prove by independent evidence that the technical failure to give one *Miranda* warning was meaningless in this case where the failure to give such an unneeded or meaningless warning represented not a willful disregard of the holding of this Court but a failure to anticipate such a holding and where the confession was clearly volunteered.

In urging that this Court permit the prosecution to establish by independent evidence that a pre-*Miranda* warning satisfied and sufficiently anticipated the requirements of *Miranda*, the Commonwealth's arguments are in keeping with the more recent decisions of this Court on retroactivity which have avoided the problems caused by the partial retroactivity given to *Miranda* by *Johnson*. See *e.g.*, *Stovall v. Denno*, 388 U. S. 293 (1967); *Desist v. United States*, 394 U. S. 244 (1969); *DeStefano v. Woods*, 392 U. S. 631 (1968); *Halliday v. United States*, 394 U. S. 831 (1969); *Fuller v. Alaska*, 393 U. S. 80 (1969). It is equally appropriate for this Court, as it did in *Jenkins*, to interpret narrowly the *Miranda* decision insofar as it is to be applied retroactively.

Thus, the evidence which the Commonwealth presented, which indicated that respondent in fact could not have availed himself of free counsel had he wished it, should have been considered by the Supreme Court of Pennsylvania and should, under the facts of this case, where the confession antedated *Miranda*, have been held sufficient to establish that respondent's confession was admissible under *Miranda*.

Similarly, the Commonwealth should have been permitted to introduce the respondent's confession because of the overwhelming evidence that the confession was not motivated by any of the coercive factors which brought about the *Miranda* decision but that it was, in fact, given voluntarily by respondent after he knowingly and intelligently

waived all his constitutional rights. To the degree that *Johnson v. New Jersey* would require the exclusion of this confession because of non-substantial technical failure to comply with the exact form of the *Miranda* guidelines which had not yet been laid down at the time the statement was given, *Johnson* should be modified to permit the state to prove that the confession was a product not of police interrogation but of respondent's desire to confess, a desire which he stated to the police before he even became a suspect.

CONCLUSION.

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this petition for Writ of Certiorari be granted.

Respectfully submitted,

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Chief, Appeals Division,
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Appendix

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON DEFENDANT'S PETITION FOR SUPPRESSION OF CONFESSIONS.

This matter is before the Court on the petition of defendant alleging that his confession in the instant case was involuntary, having been made without advice of counsel, and he not having been advised of his rights to counsel or to remain silent. It is quite clear to the Court that there is no foundation for the defendant's claims in this regard.

The alleged crime was committed on the evening of April 28, 1966; presumably this occurred some time after 4 P. M. on that day. At or about 5:30 A. M. on the following morning of April 29, 1966, the State Policeman on duty at the State Police Barracks was awakened and summoned to the door by the defendant. This officer, as all of the other officers who were involved subsequently, did not know the defendant. Upon being asked what could be done for him, the defendant said: "I am the man you are looking for". Defendant's version is that he said: "I think I am the man you are looking for". In any event, he was invited into the room and told to be seated. The police officer then awakened two of the other officers, advising them that the defendant was there. All of the officers, numbering six, testified clearly and without condition, that they had advised the defendant of the seriousness of what he was saying; that he did not have to answer if he did not desire to do so, and if he did, that it would be used against him; and that he was entitled to counsel. Without exception, each also declared that the defendant was calm and collected and that he knowledgeably and understandingly declared that he did not have need of counsel, and proceeded to tell what occurred. Within approximately one-half hour of his arrival, at the request of the police officer, he proceeded to make a

confession in his own handwriting. Thereafter, he admittedly was fully advised of his rights by the District Attorney (who arrived some one hour or so later), and answered direct questions which also constitute a confession. His sole excuse for having made the second confession, although fully advised of his rights, was that he was in a state of confusion prior thereto and at the time of making the first confession; and having realized that he had already made the first confession, he saw no reason to follow the advice of the District Attorney regarding refusal to answer, appointment of counsel, and his other constitutional rights. He freely acknowledged at this hearing that he was was not coerced, nor forced in any manner; in fact that he was treated in a gentlemanly manner throughout by the police and the District Attorney. He also acknowledged to the fact that prior to arrival at the State Police Barracks he had told his story to his wife, and that the two of them decided that he should go to the police. The Court could find practically nothing upon which there could be any doubt raised as to either the voluntariness of the confession or that defendant knowledgeably and understandingly waived all of his Constitutional rights, including those of having the right to counsel and the right to remain silent. Thus, under none of the cases can it be said that the Court has any right or privilege to suppress the instant confessions, whether it be the first or the second of them.

Furthermore, a consideration of the case of MIRANDA V. ARIZONA, 16 L. ed. 2d 694, leaves no doubt in this Court's mind that the circumstances surrounding the first confession are such as to make it fully admissible. As has been pointed out, without suggestion or direction by any authority, this defendant presented himself at the State Police Barracks, declared his involvement, and proceeded to relate what had occurred. All of this, too, was done when he was calm and collected, and knew what he was doing. One is to consider, also, that the defendant is of the age of twenty-eight years, a college graduate, and a school teacher of some eight years standing up to the time of the instant

occurrence. Thus, the confessions would also be admissible, had there been no prior instruction given to him by the police—since it was volunteered, and without force, coercion, promise of benefit, or other inducing factors, except his own desire to reveal all of the circumstances.

Therefore, the Court makes the following,

FINDINGS OF FACT.

1. Neither the handwritten confession prepared and delivered within one-half hour of defendant's voluntary appearance before the police, nor the question and answer confession given by him a bit later in answer to specific questions put to him by the District Attorney was involuntary nor within the prohibition of the ruling of MIRANDA V. ARIZONA, and other cases in the same area of consideration.

2. Defendant, both prior to the first handwritten confession and the question and answer confession thereafter given, was fully advised of his constitutional rights to remain silent and to have counsel.

3. No constitutional rights were insisted upon by the defendant, he having waived the same.

4. There was no outside influence, by force, coercion, promise, or otherwise, which led to either of the confessions.

5. The allegation of confusion of mind was not established, and if it did exist, was not such as to destroy the said confessions.

CONCLUSIONS OF LAW.

1. The handwritten confession was such that even if there had been no offer of counsel or direction that defendant had the right to remain silent (and if he did not do so, the same could be held against him) that it would still be admissible, since it was volunteered by the defendant, and since he was not at that time in such custody as to fall within the purview of the law set forth in MIRANDA V. ARIZONA, supra; and cases of like nature. This was not at all like MIRANDA V. ARIZONA, where there was incommunicado interrogation resulting in self-incriminating statements and after the defendant had been in full custody of the police and fully suspected as to the crime committed. This was a statement given free and voluntarily, without any compelling influence. As was declared in MIRANDA V. ARIZONA, supra: "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make."

2. Volunteered statements, such as those in the instant case, are not barred by the Fifth Amendment, and, therefore, are admissible in evidence.

3. The statements and directions of the police, prior to the first confession, and the advice and direction of the District Attorney prior to the second confession, fully advised the defendant of his constitutional rights.

4. Defendant's actions and words were a direct and absolute waiver of his right to take advantage of the use of counsel and to remain silent, if he so desired.

In view of the foregoing Findings of Fact and Conclusions of Law, the Court enters the following

ORDER.

NOW, September 19, 1966, petition to suppress handwritten confession and question and answer confession, both of which were sought to be withdrawn from evidence in the instant case, is denied. Both of said confessions may be used in the trial of the instant cause, saving to the defendant his right, under the law, to remain silent at trial if he so desires, and the right to attack both the voluntariness and the credibility of the confessions at trial, and to have such issues submitted to the jury under appropriate instructions, for determination of guilt.

It is the FURTHER ORDER OF COURT that the record of the within hearing be impounded and that there be no disclosure by anyone, including counsel, witnesses and court officers, of the nature and purpose of the hearing or the Judge's Order, to anyone except the Court, the defendant and counsel for the parties. Said record shall remain impounded until after final judgment in the instant cause, unless it becomes necessary to use the same for impeachment purposes.

By the Court,

/s/ JOHN A. CHERRY,
President Judge.

OPINION AND ORDER SUR MOTIONS IN ARREST OF JUDGMENT AND FOR NEW TRIAL.

After a trial of two weeks' duration, a jury adjudged Jon E. Yount guilty of rape and of murder in the first degree, and fixed the penalty on the latter at life imprisonment. Defendant filed motions for new trial and in arrest

of judgment, asserting almost exclusively only general reasons therefor. However, we have permitted presentation and argument upon all alleged errors now assigned. We have painstakingly scrutinized and analyzed the record and applicable law; and we are convinced that there is no reasonable or allowable basis upon which to sustain either motion. Examination of the record quite readily reveals that every right of the defendant was safeguarded—and, in some instances, even extended in the interest of justice. Aside from the plea entered, it is quite evident that defendant did not deny the killing, although he presented insanity as a defense; but he did deny the rape. We are fully satisfied that the evidence in this case justified both verdicts of guilt.

The testimony is voluminous, but for our present purposes we will recite the facts only briefly. Up to and prior to the occurrences involved, defendant had been a school teacher in the DuBois Area High School, and Pamela Sue Rimer, aged 18, a senior therein and a pupil in one of the classes taught by defendant. On April 28, 1966, the victim had attended school, and while walking to her home from her bus-stop in a rural area, was stopped by defendant, who requested her to direct him to a piece of land he desired to purchase. She having entered his automobile for that purpose, defendant then made improper advances, to which she objected; and threatening to expose him, she tried to leave. He grabbed her, picked up a wrench lying in the car and beat her savage blows on the head. When found later that evening, she was also found to have suffered three cuts in her neck with a sharp instrument, which reached or went through the windpipe passages and the larynx. She was cut on the fingers of her left hand, and also had numerous bruises of the head and body. Her clothing was in disarray, and one stocking had been removed, knotted, and wound about her neck. The autopsy by Dr. John Ungar, pathologist, also revealed the presence of male semen in the vagina of the victim.

At approximately 5 A. M. the following morning, defendant appeared at the State Police Barracks several miles

away and upon entering volunteered to the desk officer that "I think I am the man you are looking for". Prior thereto he had burned some, and had hidden other, of the clothing that he had worn the previous day,—because he noticed the blood stains thereon. No one disputes the fact that at this time the police had no idea of the identity of the killer, nor that it had been this defendant. In fact, defendant testified that when he stated the above to him, the officer "looked at me as if he didn't believe me. . . . I told him I thought I must have been the man that killed this girl and he said 'Well, why do you think you killed her?' and I told him I wasn't sure . . . he said 'How did you kill her?' or 'Why do you think you did it?' and I said 'I killed her with a wrench'." Almost immediately (within an hour or so), he then wrote in his own handwriting a confession, which was followed another hour or two later by a question and answer confession to the District Attorney; the latter statement having been reported by his secretary, who transcribed her notes on the same morning. Prior to both statements the defendant had been advised of his Constitutional rights.

Defendant contends, first, that the Court erred in permitting the use of defendant's second statement at trial, and in permitting the secretary to testify to it. The secretary had taken the stand and defendant's counsel then questioned its accuracy. At his further request, the Court ordered her to produce her original shorthand notes as well as a "rough draft" of the transcription she had made. Thereafter, the Court permitted the secretary to read the statement to the jury. Contrary to counsel's contention, however, the statement itself did not go out with the jury during its deliberations. Counsel argues that she should have been required to testify from recollection; and, that the statement was inadmissible in any event because not read, signed, nor sworn to by defendant. It is to be noted that defendant's previous handwritten statement, as well as this one, had been made only after his Constitutional rights had been explained and assured to him; and this,

even though MIRANDA V. ARIZONA, 384 U. S. 436, had not been decided at that time. Notwithstanding, this defendant had voluntarily come to the police and was not, at the time of interrogation, "in custody". In the cited case, it was declared: "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their holding is not affected by our holding today". Also, where a stenographer records a confession and transcribes her notes within such a short time as was done here, and on the stand establishes their accuracy, "there is no good reason why the copy itself should not be offered in connection with the original record and the original evidence of the stenographer, who in this case read to the jury from his notes and it was proper to permit him to do so": COMMONWEALTH V. RUSH, 277 Pa. 419, 121 A. 111. See also, COMMONWEALTH V. RYHALL, 274 Pa. 401, 118 A. 358. We find also that no harm or prejudice resulted to defendant, his first handwritten statement already having been admitted, and counsel objecting only "on the grounds of lack of voluntariness".

Defendant next contends that the Court erred in not sustaining his demurrer to the evidence on the charge of rape. We will not further refer to all of the evidence, which was overwhelming and which sustains the findings and verdict of the jury. To have taken this from the jury would have been to improperly take from them a function properly theirs. Defendant's claim that the Commonwealth did not sustain its burden of proof because it did not prove that semen found in the victim had not come from another source; that the victim's undergarments were not in serious disarray; and that there were not the usual signs of injury in or about the genital organs; cannot be accepted. These were properly matters to be argued to the jury—and counsel fully presented them—and the Court left their effect to the jury. Under all of the testimony and reasonable inferences justifiably drawn therefrom, the jury was

well within its province to determine that defendant had committed rape.

Defendant's third contention is that the Court should have granted his motion for withdrawal of a juror, based on an emotional outburst by the victim's mother while testifying. Respectfully, but firmly, the Court must declare that the incident was not as related by defendant. Nor, was it as reported in a Pittsburgh newspaper—which counsel seeks to use as proof. Counsel claims that the victim's mother not only began to scream and gesticulate in a highly hysterical manner, but also said in the presence of the jury: "She was all I had left in the world": and that as the jury was leaving the courtroom after the Court hastily called a recess, she declared she could not walk past the defendant. In reality, the only thing that the witness did in the presence of the jury was to let out a scream, and while breaking into tears she made unintelligible utterances. Not even the court reporter, who sat immediately adjacent to the witness box; nor the trial judge, whose sight and hearing were fixed upon the witness, heard any words at that time. Incidentally, too, the tape recorder registered no words. The fact is that these words were uttered, but only after the jury had left the Courtroom, and not within their hearing. Furthermore, the Court very strongly ordered the jury to disregard the outburst and to allow it in no way to affect them adversely to defendant's cause (see N. T. 33, 34, 35, 36). The Court was convinced at trial that the outburst was not such as to sway the jury, and is of the same mind now, particularly after full consideration of all of the testimony and circumstances. "There is seldom any criminal or civil trial of any magnitude or duration into the record of which some irrelevant, incompetent and immaterial testimony does not 'creep' and has been subsequently 'stricken out and the jury instructed to 'disregard it'. To grant new trials whenever such a thing occurred would mean an interminable and intolerable succession of new trials. There is no standard by which the effect of such formally 'steri-

lized' testimony on the minds of the jury can be gauged. In theory the law intends that no testimony shall have any but a logical effect on jurors' minds; in practice, nearly all testimony has both a logical and a psychological effect in varying ratios. The law intends that no witness's testimony shall make any appeal except to the jurors' reasoning faculties; in actual practice, a witness's testimony sometimes makes more of an appeal to the emotions than to the reason. For example, in a murder trial, the victim's widow may testify to some relevant fact of only minor importance while her very appearance before the jury may arouse the jury's feelings against the defendant. On the other hand, the appearance of the defendant's wife on the stand may by awakening the juror's compassion for her, help the defendant's cause far more than does her testimony. These only illustrate the human limitations on the practical administration of justice. The ideal of decisions based on clearly proved facts synthesized into judgments by coldly logical processes is—like most ideals—one that may be constantly approached but never reached." COMMONWEALTH V. FUGMANN, 330 Pa. 4, page 18.

That the wounds of the throat and hand of the victim were inflicted by a sharp instrument has never been questioned; but despite this, counsel contends that it was error to admit into evidence a pen-knife of defendant, which he had in his pocket at the time he surrendered himself to the police. This was one of several items, introduced in evidence as having been in defendant's possession. We find no basis for its inadmissibility, nor for new trial on that account.

Defendant's next contention is that it was error to admit photographs of the victim, and to have permitted the jury to view them. The record shows, and the Court is satisfied, that the sole purpose for introducing the pictures was to show position and condition of the body, the wounds inflicted, and necessary picturization of verbal testmony. They were not so gruesome that one can say the jury would be inflamed; and the Court gave very strong ad-

monition to the jury as to its use of them. In addition, the jury was permitted to view the whole of them for only a few minutes. We cannot believe that they but served the proper purpose of giving the jury a better understanding of the wounds, clothing, condition and position of the victim's body. Cf. COMMONWEALTH V. WENTZEL, 360 Pa. 137, 61 A. 2d 309.

In COMMONWEALTH V. DREAMER, 324 Pa. 220, 188 A. 117, the Court said (and their pronouncements are applicable in the instant matter): "It was competent for the witness who discovered (the victim's) body to describe exactly what he saw, the condition of the body, and the objects which surrounded it. It was equally competent to present a photograph which portrayed these things more accurately than mere words could do. . . . The admission in evidence of photographs of victims of murder has been sanctioned by this court and by courts of other jurisdictions, provided that the photograph was not offered and was not used for the purpose of inflaming the minds of the jurors against the accused. . . . The crime itself as necessarily revealed by the testimony of those who saw the body and by the physician who made the required post-mortem examination was of such an atrocious character that no mere photographs could add anything to the feelings which would naturally be aroused in the breast of any civilized human being, against its perpetrator. These photographs did not convict the defendant of this crime. His conviction was based on other evidence, ample and convincing."

Lastly, defendant contends that the Court engaged in "an unwarranted participation in the trial and resulted in an obvious injection of the Court's unfavorable attitude towards the witness before the jury". It is to be noted that the total of all of the Court's questions to all witnesses would not exceed the equivalent of five or six pages out of a total of 951 pages of testimony. In addition, reference to the notes of testimony will clearly indicate that the witness was failing to make important matters clear to the

jury, and likewise to the Court. The testimony was very technical, and needed to be stated so that both the Court and jury could understand it. We are quite certain that the Court's questions were not deemed by counsel to be cross-examination nor to be objectionable, since he placed no objection upon the record. At this point in the proceedings, if not before, counsel must have been convinced that he could freely so object—as it did earlier when it objected to a single question to another witness on the ground that it was leading. We believe the Court did everything possible to assure defendant his rights, and certainly did not have, nor did it inject, an unfavorable attitude towards the witness before the jury. We feel that the Court had a duty to so interrogate in order to clarify the testimony, which was far from being clear. COMMONWEALTH V. WATTS, 338 Pa. 92, 56 A. 2d 81.

We have determined upon a total review of the record and the law, and with full conscience and consideration for this defendant, that no errors were committed in the trial of this case; he having received a full, fair and complete trial which fully sustained the conviction; and, therefore, we enter the following

ORDER.

NOW, May 16, 1968, the motions for new trial and in arrest of judgment are denied; defendant to stand committed until sentence heretofore imposed is complied with.

BY THE COURT

/s/ JOHN A. CHERRY,
President Judge.

JUDGMENT OF SENTENCE.

Oct. 7, 1966—And now Sentence:

No. 2 May Sessions, 1966—Life imprisonment on the murder bill to the State Correctional Institution at Pittsburgh to separate and solitary confinement.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

OPINION BY MR. JUSTICE ROBERTS, June 27, 1969:

On April 28, 1966, the body of an 18 year old high school student, was found in a wooded area near her home in Luthersburg, Pennsylvania. Except for one stocking which was tied around the deceased's neck and one sneaker which was found under the victim, the body was fully clothed, although the skirt was swirled around the body in a way as to suggest that the body had rolled down a hill. An autopsy revealed that death was caused by strangulation resulting from blood drawn into the victim's lungs from wounds on the deceased's throat and neck. The autopsy also revealed numerous wounds about the girl's head, apparently caused by a blunt instrument. Although there was blood over much of the deceased's clothing, the amount of blood on the undergarments of the girl was less than on her outer clothing, and the examining physician testified that all the blood came from the wounds on the deceased's head and neck.

The physician performing the autopsy testified that the body revealed no indication that the victim had been sexually assaulted. Her undergarments, consisting of underpants over which was a garter belt, were intact and apparently undisturbed, and appeared to not be dirty despite the fact that the body was found in an area that was

covered with mud and wet leaves. There was no sign of injury or damage in the victim's genital area, nor was there any irritation in the vaginal tract. Subsequent photographs revealed bruises on the front of the deceased's thighs which the examining physician described at trial as "minute." Examination disclosed that the victim's hymen was intact.

Essentially as a matter of routine, the physician then performed a vaginal aspiration. The results disclosed a quantity of largely disintegrated spermatozoa in the vagina of the deceased.

Early on the morning of April 29, 1966, appellant, a teacher at the high school which the deceased attended appeared at the State Police Substation in DuBois, Pennsylvania, and stated that "I am the man you are looking for." When asked by a policeman whether he was referring to "the incident in Luthersburg," appellant replied affirmatively.

At this point, appellant was invited to sit down and was given something to eat. One of the officers then began questioning appellant, asking him "How did you kill that girl?" According to the officer, appellant replied "I struck her with a wrench and I choked her." The officer here gave appellant warnings which the Commonwealth concedes did not include appellant's right to free counsel if he could not afford his own attorney. The conference recommenced and appellant gave his first confession. Later appellant was questioned by the district attorney, who again failed to tell appellant of his right to free counsel, and appellant gave another confession. At no time did appellant confess to making any sexual advances at the deceased.

Appellant was indicted on charges of murder and rape. Before trial, appellant moved to suppress the confessions as violative of *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966). After a hearing, the motion was denied, the trial commenced on September 28, 1966, and the confes-

sions were admitted at trial over appellant's objection. At the close of the prosecution's case, the trial court refused to sustain appellant's demurrer to the rape charge. The rape issue was submitted to the jury, along with a felony murder charge, and appellant was convicted of murder in the first degree and rape and was sentenced to life imprisonment. Appellant now appeals, claiming that it was error for the court below to admit the confessions and to submit the rape and felony murder issues to the jury.

Although appellant's confessions came before the decision in *Miranda*, since appellant's trial took place after *Miranda*, the admissibility of the confessions is determined under the *Miranda* rules. *Johnson v. New Jersey*, 384 U. S. 719, 86 S. Ct. 1772 (1966). The case before us illustrates the difficulty for the Commonwealth which *Johnson* can cause. Although appellant appears to have received almost all the warnings required by *Miranda*, he was not told that he was entitled to free counsel if he could not afford his own attorney. See, e.g., *Commonwealth v. Dixon and Kontos*, 432 Pa. 423, 248 A. 2d 231 (1968). Thus the Commonwealth failed to give all the warnings necessitated by *Miranda*, and this it was required to do even though *Miranda* had not yet been decided.

The Commonwealth attempts to get out of the corner into which it apparently has been painted by arguing that appellant's confession was "voluntary." But although appellant's confession was certainly voluntary in the *Davis v. North Carolina*, 384 U. S. 737, 86 S. Ct. 1761 (1966) sense, it was not *volunteered* as required by *Miranda*. After indicating a willingness to talk, appellant was *interrogated* about details of the crime, and his formal confession followed. Once appellant was to be asked questions designed or expected or likely to elicit a confession, *Miranda* warnings were necessary. See *Commonwealth v. Simala*, 434 Pa. 219, 252 A. 2d 575 (1969); Institute of Continuing Legal Education, "Criminal Law and the Constitution—Sources and Commentaries" 356 (1968). In *Simala*, we held that merely asking a prisoner who was in custody and sus-

pected of a crime to talk if he so wished constituted interrogation and required *Miranda* warnings. Certainly here, where appellant was *interrogated* as to the *details* of the crime, warnings were necessary.

At oral argument the Commonwealth also maintained that the police were not obligated to tell appellant that he had a right to free counsel if necessary because they knew that he could afford counsel. The Court in *Miranda* stated the rule relied on by the Commonwealth as follows: "While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, *the expedient of giving a warning is too simple and the rights involved too important to engage in ex post facto inquiries into financial ability when there is any doubt at all on that score.*" 384 U. S. at 473, n. 43, 86 S. Ct. at 1627, n. 43. (Emphasis added.) We recently held in *Commonwealth v. Dixon and Kontos*, supra, that "this loophole is a narrow one which can be utilized only in the clearest of cases." 432 Pa. at 426-27, 248 A. 2d at 233.

This case is exactly the kind in which we should not indulge in "ex post facto inquiries into financial ability." Appellant was a school teacher, and it could hardly be assumed that his past earnings easily could bear the weight of expense that a murder trial would entail. As we pointed out in *Dixon and Kontos*, the requirement of warnings is designed to prevent us from having to speculate about a situation where appellant may have been "unaware that free counsel was available if necessary, had been reluctant to incur further [Kontos had been represented by counsel in another matter] attorney fees, and had decided to try to get through the questioning unaided." *Id.* at 427, 248 A. 2d at 234. In the case before us, we can hardly say that the police could properly entertain that degree of certainty concerning appellant's ability to retain counsel so as to obviate the need for telling him that free counsel was available if necessary. We thus hold that appellant's confessions were erroneously admitted.

Having found appellant's confessions to be invalid, we must grant him a new trial. Since part of the Commonwealth's case as to rape is based on inferences that could be drawn from the confessions, we will not pass on whether the Commonwealth presented sufficient evidence to overcome appellant's demurrer to the rape charge.

The judgment of sentence of the Court of Oyer and Terminer of Clearfield County is reversed and a new trial granted.

Mr. Justice COHEN concurs in the result.

CONCURRING OPINION BY MR. JUSTICE JONES:

With the utmost reluctance I concur in the result reached by the majority of this Court.

Clearly the statements made by Yount prior to the institution of the police "questioning" were admissible. However, once the police "questioning" began, then the warnings mandated by the ruling of the United States Supreme Court in *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966), were required to be given. In the absence of such warnings, the statements of Yount were inadmissible.

Under the compulsion of *Miranda* and, only by reason thereof, I concur in the majority's result.

Mr. Justice POMEROY joins in this opinion.

DISSENTING OPINION BY MR. CHIEF JUSTICE BELL:

On April 28, 1966, the body of Pamela Sue Rimer was found in a wooded area not far from her home. An autopsy revealed that the cause of death was shock, loss of blood and suffocation due to the presence of blood in the lungs. An examination revealed numerous wounds around the deceased's head and neck.

Early in the morning of the following day the defendant Yount, a teacher at the high school attended by the de-

ceased, appeared at the State Police Barracks several miles away and stated to the officer in charge, "I think I am the man you are looking for." At trial, the defendant testified that the officer "looked at me as if he didn't believe me.... I told him I thought I must have been the man killed [sic] this girl and he said 'Well, why do you think you killed her?' and I told him I wasn't sure. . . . He said 'How did you kill her?' or 'Why do you think you did it?' and I said 'I killed her with a wrench' ". Within an hour or so he wrote a confession to the crime in his own handwriting.

The Majority admit that the aforesaid confession would have been held to be voluntary and admissible if made prior to *Escobedo v. Illinois*, 378 U. S. 478; *Miranda v. Arizona*, 384 U. S. 436; *Davis v. North Carolina*, 384 U. S. 737. However, they would reverse the defendant's conviction because no *Miranda* warnings were given prior to this, the first of two confessions that the defendant made. But by its own language *Miranda v. Arizona*, 384 U. S., supra, is expressly *inapplicable* to a situation such as the present one where a defendant *voluntarily* walks into a police station and makes a confession.

In *Miranda v. Arizona*, 384 U. S., supra, the Court pertinently said (page 478): "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." It is difficult to imagine a case which would more closely fit this language than the one now before us. Once more I vigorously protest the *extension* of *Miranda* by a majority of this Court *and the practical elimination of the desperately needed protection of countless millions of peaceful, law-abiding citizens.*

The Majority states that the *Miranda* warnings were necessary merely because the defendant was asked by the officer in charge about the details of the crime and such questioning was likely to elicit a confession. *Commonwealth v. Simala*, 434 Pa. 219, 252 A. 2d 575, does not support the proposition that questioning alone will trigger the necessity for *Miranda* warnings. Furthermore, *Simala*, on its facts, is clearly distinguishable from the present case. In *Simala*, the defendant was *taken into custody* for violation of his parole by carrying a gun. While *detained* at the office of the town mayor the defendant was asked by the mayor if he wanted to talk, whereupon the defendant orally confessed to shooting the deceased. That confession was held to be inadmissible because the *Miranda* warnings had not been given prior to defendant's oral confession. What distinguishes *Simala* from the present case is that Simala was "in custody" at the time he was questioned. The holding in *Miranda* clearly makes "custody" one of the factors which require the warnings to be given: ". . . when an individual *is taken into custody** or otherwise *deprived of his freedom** by the authorities in any significant way *and** is subjected to questioning, the privilege against self-incrimination is jeopardized." *Miranda v. Arizona*, 384 U. S., supra (page 478). In the instant case, the defendant Yount was certainly not under arrest nor in custody or otherwise deprived of his freedom.

In *Commonwealth ex rel. Corbin v. Myers*, 423 Pa. 243, 245-246, 223 A. 2d 738, the Court said that ". . . the issue of determining voluntariness depends largely upon the facts of the particular case, i.e., the total combination of circumstances (Reck v. Pate, 367 U. S. 433; Commonwealth v. Brown, 309 Pa. 515, 164 A. 726)." The total combination of circumstances in this case clearly shows (1) that the defendant Yount made his first confession voluntarily, and (2) that no *Miranda* warnings were necessary, and (3) that his confession was properly admissible.

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* Italics, ours.